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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

FEB 11 2003

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File: EAC 02 021 52961 Office: Vermont Service Center

Date:

FEB 11 2003

IN RE: Petitioner:
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:

Identifying data deleted to
prevent invasion of personal privacy
warrant

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is April 26, 2001. The beneficiary's salary as stated on the labor certification is \$13.38 per hour or \$27,830.40 per annum.

Counsel initially submitted a copy of the petitioner's 2000 Form 1120S U.S. Income Tax Return for an S Corporation which reflected

gross receipts of \$1,101,630; gross profit of \$421,945; compensation of officers of \$152,800; salaries and wages paid of \$0; and an ordinary income (loss) from trade or business activities of \$5,196.

On November 26, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage.

In response, counsel submitted a copy of the petitioner's Net Income Report for the period from April 1, 2001 through June 30, 2001.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits a copy of the petitioner's 2000 Form 1120S U.S. Income Tax Return for an S Corporation which now reflects gross receipts of \$1,567,622; gross profit of \$887,937; compensation of officers of \$97,800; salaries and wages paid of \$55,000; and an ordinary income (loss) from trade or business activities of \$471,188.

Counsel states:

- 1) On 10/11/01 we submitted the enclosed package to the INS. (Exhibit A).
- 2) On 11/10/01 we realized that we had submitted the wrong tax return because our client called us, so we submitted the correct tax return on 11/11/01. (Exhibit B).
- 3) On 11/28/01 we received a blue notice and on 1/11/01 we timely answered the blue notice. (Exhibit C).
- 4) We submit all copies of all mailing notices and green cards returned as proof of the these filings. (Exhibit Z).

The petitioner initially submitted Form 1120S for the calendar year 2000, dated February 9, 2001 shows an ordinary income of \$5,916. The petitioner could not pay a proffered salary of \$27,830.40 out of this figure.

On appeal, counsel submits another Form 1120S for the same calendar year 2000, dated February 11, 2001, with the same employer number.

This tax return shows an ordinary income of \$471,188. While this tax return establishes the petitioner's ability to pay the proffered wage, there is no evidence in the record which clearly establishes which tax return was actually filed with the IRS. Absent this evidence, it is not clear that the petitioner had the ability to pay the wage offered.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988).

Accordingly, after a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered at the time of filing of the petition and continuing to present.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.